Supreme Court, U. S.
FILED
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

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October 9, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANS-AMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNE-SOTA, a Minnesota corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

The Petitioner, FRANCIS M. COCKE, respectfully prays that a Writ of Certiorari issue to review the Order of the Arizona Court of Appeals entered in 1 CA-CIV 2970 (Maricopa County Superior Court No. C-222472), on February 24, 1975.

OPINIONS AND JUDGMENTS BELOW

AND

JURISDICTION

The February 24, 1975 Order of the Court of Appeals dismissing petitioner's appeal and imposing sanctions is at page 542 of Volume VI of the Appendix hereto.

Petitioner's timely motion for rehearing in the Court of Appeals (A. 552) was denied May 16, 1975 (A. 592). His timely petition to the Arizona Supreme Court for review was denied without opinion (Justice Struckmeyer voting to review) on June 18, 1975 (A. 596).

Petitioner's timely motion (A. 598) for rehearing on the Arizona Supreme Court's Order denying review was denied without opinion (Justices Lockwood and Hays not participating) on July 15, 1975 (A. 604).

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

Federal rights were claimed in C-222472, in the trial and appellate courts. See Appendix at pages 279, 280; 302-304; 398-400; 437; 467, 468; 550, 551; 560, 561.

The federal claims were not discussed or directly ruled on by the state courts.

QUESTIONS PRESENTED

Whether under the United States Constitution and laws a state court is without subject matter jurisdiction (1) to remake valid written agreements and enforce them as remade, (2) to bind by judgment and execution a real party in interest where not joined in the proceedings, and (3) to enter and enforce judgment without findings or conclusions on undisputed documentary evidence presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE (1970)

UNITED STATES CONSTITUTION

Article I, Sections 1 & 8 (last clause):

Section 1 (Vol. 1, p. XLIII): All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8, last clause (Vol. 1, p. XLV) is quoted infra at page 26.

Article IV, Sections 1 & 2 (first clause):

Section 1 (Vol. 1, p. XLVII): Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2, first clause (Vol. 1, p. XLVII): The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Article VI (Vol. 1, p. XLVII):

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall every be required as a Qualification to any office or public Trust under the United States.

Amendment V (Vol. 1, p. XLVIII):

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in

time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Sections 1 & 5:

Section 1 (Vol. 1, p. XLIX): All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 (Vol. 1, p. L): The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, TITLE 42:

Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be

subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 1983. Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985(3). If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or

Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1986. Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Section 1988. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all person in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found quilty.

STATEMENT OF THE CASE

This action arose out of disputes over the terms and conditions contained in a written escrow agreement for the sale and purchase of land (A. 54-80).

Certain land owned by petitioner (F. M. Cocke) and other land held in trust was agreed to be sold under the terms of the agreement to Respondent James Stewart Company, or its nominee, the Respondents Horne (hereinafter referred to as "Buyers"). Respondent Transamerica Title assumed the duties of escrow agent and title insurer under the agreement, dated October 9, 1968.

Petitioner deposited into escrow executed warranty deeds (A. 272) for the land to be conveyed by him as well as executed releases of mortgage (A. 276) tendered by the Buyers. Petitioner performed all duties agreed to, but refused to execute deeds for acreage designated as Parcels 1A and 2A, as demanded in writing by the Buyers. This land had been expressly excepted from the transaction, and was not the subject of any contract.

On March 5, 1969, the petitioner filed a 13-day notice of intent to cancel, as provided for by the escrow agreement, upon the continued failure of the Buyers to comply with the terms and conditions of the escrow agreement by depositing the required amounts of money and mortgages. On March 7, 1969, the Buyers tendered two personal checks, unacceptable under the terms of the agreement, and drawn on an out-of-state bank, to cover part of the admitted deficiency in the mortgages deposited by Buyers (A. 91).

On April 22, 1969, the Buyers' deposit into escrow of funds and mortgages was still at least $64,000.00 short of the amount required by the terms of the escrow agreement. On that date, Buyers brought a civil action in Maricopa County, Arizona, Superior Court, Cause number C-222472, against the named Sellers, Francis M. Cocke and Joan H. Cocke, divorced, for specific performance of the terms of the agreement. Transamerica, holder in escrow of the deeds, money, mortgages and mortgage releases, refused to issue title insurance and refused to deliver or to redeliver the deeds, but was never named by Buyers as a party defendant.

F. M. Cocke brought an affirmative action jointly as well as severally against

all three of the other parties. The trial court judge severed the action into three separate actions, and entered separate and independent judgments against F. M. Cocke and in favor of each of the other parties (A. 102, 106, 110 & 116). Each of these judgments altered the agreement of the parties.

Relief is sought herein from these three state court judgments, and the orders issued in execution under one of them, on the grounds that these judgments and orders:

(1) fundamentally alter, and would enforce as so altered, the four-party escrow agreement for the sale and purchase of land;

(2) were based on the asserted power of the state court to bind by judgment a real party in interest, and thus an indispensable party, but not joined in the action, resulting from the state court's splitting of petitioner's affirmative action to enforce the indivisible contract into three separate and independent actions, with separate and independent proceedings and judgments; and

(3) were entered without findings on undisputed documentary evidence presented, which evidence shows that the actual agreement entered into was repudiated, or cancelled under its own specific cancellation provisions, before the litigation over it began.

It is petitioner's position that these judgments and orders were entered without jurisdiction in the court over the subject matter, on each of the above three grounds,

which are designated ALTERATION OF CONTRACT, INDISPENSABLE PARTIES, and WANT OF FINDINGS.

It is also petitioner's position that the entry of such judgments and orders has deprived petitioner of due process of law, as secured to him and as protected by the United States Constitution and laws, including the 14th Amendment and Title 42 U.S.C. Sections 1981-1988.

1. ALTERATION OF CONTRACTS

The escrow agreement (A. 54-80) provided that the Buyer was to pay, in addition to the payment of other sums and the deposit of mortgages, as the first annual installment on the mortgages $64,000.00 on January 2, 1969. As provided for in the agreement by its cancellation paragraphs 16, 17 and 18 (A. 62), on March 6, 1969 escrow agent Transamerica gave written notice to Buyer that to avoid cancellation it must comply with the terms of the agreement by March 19, 1969 (A. 90).

The September 27, 1972 judgment in favor of the Buyers (A. 116) altered such 13-day period of grace by adding thereto some four years and eight months, allowing the Buyers to comply with the agreement by November 27, 1973, one year after expiration of the 60-day period for appeal. The last three paragraphs of Buyers' judgment of September 27, 1972 (A. 128) are quoted here:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of

the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the plaintiffs' compliance with the terms of said contract as modified hereby."

(emphasis added)

As to the validity and consequent finality of judgments which alter agreements, in Goodman v. Newzona, 101 Ariz. 470, 421 P.2d 318 (1967), the court stated the universal rule:

"* * *It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement.* * *

> "It is the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh." * * *

Brandt v. Brandt (1953) 76 Ariz. 154, 261 P.2d 978, held that the statute of limitations does not bar an attack upon a void judgment, but that it may be attacked anywhere and at any time, and quoted with approval Brecht v. Hammons (1929) 35 Ariz. 383, 278 P. 381, 382:

> "Three things must concur or a judgment is void upon its face, and may be attacked at any time. The Court must have (a) jurisdiction of the subject-matter of the case, (b) jurisdiction of the persons involved in the litigation, and (c) jurisdiction to render the particular judgment given."

The court was plainly without jurisdiction to render judgments which altered the agreement of the parties.

The trial court's modification of the contract was in contravention of the Constitution and laws made in pursuance thereof and this Court's proceedings.

2. INDISPENSABLE PARTIES

As previously stated, Transamerica was never joined in the Buyers' suit for specific performance. Transamerica refused to deliver petitioner's deeds to the Buyers, and they successfully petitioned the trial court for an order granting a writ of

assistance. The Order Granting Writ and the Writ itself (A. 146, 153) entered October 31, 1973, and issued solely under Buyers' judgment, were directed to Transamerica and to Minnesota Title as substituted for Transamerica with all its rights, privileges and duties (A. 149), contrary to the law announced in Terrell v. Allison, 21 Wall. (80 U.S.) 289 (1875).

Terrell stated the rule that a writ of assistance can only issue against parties whose rights have been determined in the proceedings, and persons entering into possession under them after suit commenced, pendente lite, and are thus bound by the decree. See also Howard v. Milwaukee & St. Paul R. Co., 101 U.S. 837 (1880), citing and following Terrell.

Terrell also stated the long-standing rule that the jurisdiction of a court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties. This would leave the court without subject-matter jurisdiction where without power to enforce its judgment or decree. For this rule see also Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, 156, cert. den. (1972) 406 U.S. 945.

These same rules apply to all the separate and independent proceedings held and judgments entered following the splitting of F. M. Cocke's affirmative action into three separate actions. See Louisville and Nashville Railroad Co. v. Ide, 114 U.S. 52, 55-57 (1885), and St. Louis and San Francisco Railway Co. v. Wilson, 114 U.S. 60, 62 (1885), on splitting of multi-party actions by the attempted removal of parts thereof to federal court on the grounds of diversity. See also Arizona

and Federal Rules of Civil Procedure, Rules 17 and 19; Mosher v. Hiner, 62 Ariz. 110, 154 P.2d 373 (1944), cert. den. 325 U.S. 874.

That Transamerica was an indispensable party is easily shown. After the trial court severed the action, granted summary judgment in favor of Transamerica, and entered an interlocutory summary judgment in favor of Buyers, the Buyers and Transamerica agreed that additional deposit of funds with Transamerica was necessary to bring the Buyers into compliance with the four-party escrow agreement (A. 96). Subsequently, Transamerica and the Buyers acknowledged that still more funds must be deposited with Transamerica before the Buyers would be in compliance (A. 99, 100).

From the beginning the Buyers sought specific performance by F. M. Cocke of the duties plainly delegated to and assumed by Transamerica. The issuance of title insurance, the closing of escrow and the delivery of the deeds were totally under the control of Transamerica. The trial court judge in the September 27, 1972 judgment granting the relief sought by Buyers ordered F. M. Cocke to "perform all obligations necessary", without finding what oligation he had assumed and then failed to perform, but conditioned such performance, and the judgment, on Buyers' compliance with the agreement.

Throughout the life of the case, it has been alleged that F. M. Cocke had failed to perform the contract by refusing to execute documents but never has there been a finding as to what required documents F. M. Cocke refused to execute and, virtually every pleading, motion, holding and judgment arising out of or related to these facts is based on this one unfounded

conclusion.

Nearly a year after entry of the September 27, 1972 judgment, Buyers petitioned for a writ of assistance ordering Transamerica to perform or for certain alternative relief. The court was without jurisdiction over Transamerica, was without jurisdiction to enforce a judgment requiring action by a party not joined, and the judgment was void on its face. Earle v. McVeigh 91 U.S. 503, 507 (1876); Brandt v. Brandt, supra; Preston v. Denkins, 94 Ariz. 214, 383 P.2d 686 (1963). The trial court's severance of the action and failure to join indispensable parties was in contravention of the Constitution and laws made in pursuance thereof and this Court's proceedings.

3. WANT OF FINDINGS

In an equity case, it is the duty of the court to make meticulous findings. U.S. v. Aluminum Co. of America, D.C.N.Y. (1941), 44 F.Supp. 97, cause certified and transferred 322 U.S. 716, affirmed in part and reversed in part on other grounds, 148 F.2d 416. See 28 USCA (1971), Rule 52, Note 31, Duty and Function of Court, page 29.

Petitioner timely filed three requests for findings and conclusions pursuant to Rule 52 (A. 281, 341, 345) and filed objections to Buyers' Amended Proposed Findings and Conclusions and Second Amended Judgment (A. 347). As the sum and substance of the requests and objections, petitioner sought findings as to:

1. By what specific act, or failure to act, had F. M. Cocke failed or refused to perform.

2. Whether or not the Buyers had, in fact, complied with the terms and conditions of the escrow agreement as made by the parties to the agreement.

In none of the separate and independent judgments, in favor of Buyers, or Transamerica, or John Cocke, nor in the trial court judge's orders based thereon, was there ever any finding as to petitioner's specific failure to perform or as to Buyers actual performance. The only findings in September 1972 pertaining to performance was "Cocke has refused to convey the property to Stewart or to the Hornes" and "Plaintiffs have been ready at all times to close this transaction. . .". Readiness, willingness and ability are not material to actual performance. See 28 Am Jur 2d, Escrow, Sections 21, 22, 24; 30A CJS Escrows, Sections 10(a), 10(b), and cases cited.

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 368, 369 (1936), the court said:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In United States v. Aluminum Co. of America, 2 F.R.D. 224, 231 (1941), the District Court S.D. New York said:

> "Rule 52 is incontrovertibly valid. It is also mandatory; it is as binding on this court as would be a statute in the same

terms. Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U.S. 603, 608, 609, 19 S.Ct. 761, 43 L.ed 1103; Weil v. Neary, 278 U.S. 160, 165, 169, 170, 40 S.Ct. 144, 73 L.ed 243. See In re G. W. Giannini, Inc., 2 Cir., 90 F.2d 445, 447, 111 A.L.R. 1492. . . . For the reasons given, therefore, it seems to me (1) that this court is without authority to dispense with either the findings or the conclusions contemplated by Rule 52 and (2) that, in order to obey the rule, as construed by the Supreme Court--regardless of the contents of the oral opinion--findings must be made and conclusions stated on all issues in the present case."

Plainly, the failure or refusal to make findings was a deprivation of petitioner's right to due process, in contravention of the Constitution, laws made in pursuance thereof and this Court's proceedings.

BUYERS' CONDITIONAL JUDGMENT

The judgment entered on September 27, 1972 was conditional, and so interlocutory, on its face. In the next to the last paragraph of the judgment, supra, page 12, the ordered performance by F. M. Cocke is conditioned upon compliance by plaintiff Buyers with the terms of the original contract of October 9, 1968. In the last paragraph the force and effect of the judgment is specifically subjected to, or conditioned on, the plaintiff Buyers' compliance with the terms of the contract "as modified hereby."

It is well settled that a judgment which conditions its force and effect on

the performance of certain acts to be done in the future by the parties, as here, remains without force or effect unless and until the conditions are fulfilled. Federal Land Bank of Louisville, Ky., v. Roney, 139 F.2d 175 (7th Cir. 1944), cert. den., 322 U.S. 753, rehearing denied, 323 U.S. 810, held that:

> "* * *A judgment which will not become effective unless certain conditions are complied with, or which may be defeated or amended by performance of a condition subsequent, is no bar to a second action on the same subject matter unless it has become absolute by a performance of the conditions in the one case, or failure to perform in the other* * *."

The fulfillment of the condition specified by the judgment in its last paragraph is itself conditioned on the asserted power or jurisdiction of the court to "modify" the agreement by allowing the extra four years and eight months for the Buyers to comply, which power or jurisdiction it did not and does not have. The relief of alteration of the escrow agreement was not relief which could be granted. Goodman v. Newzona Investment Co., supra.

After entry of the conditional judgment, petitioner filed a Motion To Vacate (A. 368) on the ground of lack of subject matter jurisdiction, which was denied. An appeal was filed within 60 days of the denial of the motion and was dismissed as "untimely".

F. M. Cocke then filed a Motion for Findings of grounds (A. 434) upon which

the appeal was held untimely. Petitioner sought a Court of Appeals ruling on whether the untimeliness was because (i) the Motion To Vacate was not deemed a motion to alter or amend and therefore did not extend the time for appeal (FRCP 59(e), Arizona Rules of Civil Procedure 59(l)), or (ii) on the plain fact, earlier called to the court's attention (A. 431), that the judgment was conditional and therefore not appealable until a final judgment was entered (Arizona Revised Statutes, 12-2101). The motion for findings was later denied and the court did not reach the merits of the questions presented in that 1973 appeal:

> "WHETHER THE SUMMARY JUDGMENTS DATED NOVEMBER 10, 1970, IN FAVOR OF TRANSAMERICA, IN THEIR ORIGINAL FORM AND AS MODIFIED BY THE ORDER DATED NOVEMBER 6, 1972, AND THE SUMMARY JUDGMENT DATED SEPTEMBER 27, 1972, IN FAVOR OF BUYERS, WERE AND ARE VOID FOR WANT OF JURISDICTION."

F. M. Cocke's earlier appeal from Transamerica's summary judgment entered November 10, 1970 is reported as Cocke v. Transamerica Title Insurance Co. of Arizona, 16 Ariz. App. 556, 494 P.2d 756 (1972).

Final judgment on the Buyers' action was entered on September 30, 1974 (A. 165).

On November 27, 1974 F. M. Cocke filed notice of appeal (A. 497) from the September 30, 1974 order and judgment and all orders, judgments and rulings entered in C-222472.

The Buyers and Title Insurance Company of Minnesota, a Minnesota corporation, as

an officer of the court, filed a motion to dismiss the appeal and impose sanctions in the form of attorney fees (A. 501), as did also Transamerica (A. 531).

In timely responses (A. 513, 547) to these motions, F. M. Cocke pointed to the issues, raised by claims of res judicata, of the lack of jurisdiction of the lower court to alter the escrow agreement, to bind by judgment a party in interest but not joined in the action as an indispensable party, and to enter judgment without findings and conclusions on documentary evidence presented, as well as the issues of Buyers' conditional judgment. All of these issues go to the validity and consequent finality of the judgments and orders appealed from as well as to the federal question of the denial of due process.

However, the Court of Appeals' Order, entered February 24, 1975 (A. 542) dismissed the appeal and imposed sanctions in the amount sought on the stated grounds that no issues of any substance were raised by the appeal, that it was taken solely for delay, and was completely frivolous. F. M. Cocke's opening brief was filed March 10, 1975.

The threshold questions of the lower court's jurisdiction to alter contracts, enter judgment in the absence of indispensable parties and without findings to support the judgment were never reached by the appellate court.

It is a fundamental principle that if jurisdiction is lacking the trial court should on its own motion decline to proceed, and the jurisdiction of the appellate

court on review is limited to correcting the error of the trial court in entertaining the action. United States v. Corrick, 298 U.S. 435, 440, 56 S.Ct. 829, 80 L.Ed. 1263 (1936); Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965), 341 F.2d 514; Riley v. County of Cochise, 10 Ariz. App. 55, 455 P.2d 1005 1969); Quiroz v. Alfaro, 18 Ariz. App. 173, 500 P.2d 1161 (1972). See Federal Rules of Civil Procedure 17(a), 19, 52, 56, 12(b)(1,6,7), 12(h)(2,3); Arizona Rules of Civil Procedure, 16 ARS.

Petitioner has been denied fundamental rights guaranteed him by the Constitution and laws made in pursuance thereof and this Court's proceedings.

REASONS FOR GRANTING THE WRIT

Fairly comprised in the Questions Presented For Review is a substantial federal question involving every citizen's right in state court civil actions to the protection of the Constitution and laws made in pursuance thereof and this Court's proceedings.

WHETHER A CIVIL JUDGMENT WHICH INCLUDES OR IS PREDICATED ON THE DEPRIVATION OF A FEDERAL RIGHT CAN BE CARRIED INTO EXECUTION AS DUE PROCESS, OR IS VOID.

The question presented is the threshold question necessary for a determination of remedy and procedure for the vindication of the deprivation of any right, privilege or immunity secured or protected by the Constitution, laws and proceedings of this

Court and arising directly out of state court litigation of civil matters.

Answers to the question have been implied by the Court in multiple proceedings, and are clearly arguable from a logical analysis of the Constitution and laws, but it appears that the question has never been answered by a specific pronouncement of this Court.

In proceedings in recent years there has been an apparent return to many of the fundamental principles adhered to in the post-14th Amendment period, and the Court recognizes that the power to make civil and criminal laws in pursuance of the Constitution, and the power to alter or suspend, even momentarily, the effect of such laws, is vested in the Congress, not the courts or judges, state or federal.

In Scheuer v. Rhodes, 416 U.S. 232, 237 (quoting Ex parte Young, 209 U.S. 123, (1908)), the court affirmed its 1908 ruling that when a State judge acts under State law in a manner violative of the Federal Constitution, he is in that case stripped of his official character and personally subjected to the consequences of his individual conduct.

In Alyeska Pipeline Service Co. v. Wilderness Society, U.S. , 44 L.Ed.2d 141, 161, 95 S.Ct. 1612, 1628 (May, 1975), the Court said:

> "It is not for us to invade the legislature's province* * *".

It cannot be seriously denied that state court litigants, both civil and criminal, are from time to time denied,

either willfully or negligently, protection of the laws of the United States, laws by which the judges in every state are bound.

In Lee v. Florida, 392 U.S. 378, 386 (1968), the Court, pointing to Article VI of the Constitution, said:

> "Under our constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States, laws by which' the judges in every State (are) bound* * *."

Of course, if such a case involves criminal litigants, relief is readily at hand and frequently depends on little more than a mechanical selection of remedy based upon and conditioned by facts and procedure. The deprivation of a criminal litigant's federal right to due process is readily vindicated under the Constitution and this Court's decisions, whether the deprivation be willfull or negligent.

The 14th Amendment (1868), secured the right to "due process of law" for the protection of persons and property to all persons, and although not spelling out what the phrase "due process" meant, specifically gave Congress the power to enforce the amendment's provisions by appropriate legislation, in its Section 5.

By enacting 42 U.S.C. Section 1981 in the year 1870, some two years after the adoption of the 14th Amendment, Congress secured the right to make and enforce contracts, and to due process of law in the courts (by specifying what constitutes such due process), to all persons within the jurisdiction of the United States, so

forming but a single class, all members of which have these rights, as intended by the 14th Amendment. No distinction was made between those persons, civil litigants, and those persons, criminal litigants.

In the year 1885, in Barbier v. Connelly, 113 U.S. 27, 31 (quoted and followed in Truax v. Corrigan, 257 U.S. 312, 334 (1921)), the court said:

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, * * *that all persons* * *should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; * * *."

A state court civil judgment including or predicated on the deprivation of a federal right, if pronounced to be one which can be carried into execution as due process, precludes any collateral attack on the judgment and any remedy against one taking under the judgment. That is, if such a judgment can be carried into execution, then the state court's jurisdiction and proceedings continue "until that judgment shall be satisfied." Hamilton v. Nakai, 453 F.2d 152, 156 (9th Cir., 1972) cert. den. 406 U.S. 945. On the other hand, if such a judgment is pronounced to be voidable, void or otherwise incapable of execution, the state civil litigant deprived of his federal rights may finally find himself

to be one of the class of all persons protected by the Constitution. It would appear that the state court would be divested of subject matter jurisdiction at the point of deprivation of federal right and that further proceedings would necessarily be void. Hamilton v. Nakai, supra; Earle v. McVeigh, 91 U.S. 503, 507 (1876). The invalidity of the state court proceedings could be shown prior to satisfaction of the judgment, and equitable relief could be sought to prevent a taking under a void judgment. As to the judiciary: the determination of the comprised question establishes a threshold for the enforcement and vindication of a civil litigant's rights under the provisions of Title 42 U.S.C. Sections 1981-1988, in the face of the "judicially fashioned doctrine" of judicial immunity. See O'Shea v. Littleton, 414 U.S. 488, 503 (1974).

The question of judicial immunity is not raised in the context of this petition but is directly raised in a companion Petition for Certiorari, arising from the same state trial court litigation and allowed to be docketed by this Court on June 6, 1975 (74-1532). The discussion presented here in that regard is respectfully submitted in order to point out the breadth of the comprised question, its importance to the judiciary, and to all persons, whether citizens or within the jurisdiction of the United States, and the far-reaching effect of the answer to it.

The last clause of Article I, Section 8, of the Constitution states:

> "The congress shall have power * * *To make all Laws which shall be necessary and proper for

carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Plainly, under this provision and Articles IV and VI of the Constitution, no court, state or federal, or a judge thereof, has the power to carry into execution, and so into effect, any judgment which would alter or suspend even momentarily any provision of a law made in pursuance of the Constitution, absent action of Congress.

Congress has made laws necessary and proper for assuring that any citizen of the United States or person within its jurisdiction, who is deprived of any rights, privileges or immunities, has a federal remedy at law or in equity (42 U.S.C. 1981-1988).

This court announced in O'Shea v. Littleton, supra, that a judge who willfully deprived a citizen of his Constitutional rights was deterred by the provisions of 18 U.S.C. Section 242. It is a historic maxim of the law that for every wrong there is a remedy. It is respectfully submitted that Congress intended to and did provide a remedy as well as a deterrent, and that state court litigants suffer from both willful and negligent deprivations of federal rights. The criminal litigant who has been deprived negligently of a federal right is vindicated just as surely as one who has been deprived willfully. No distinction was made in the Fourteenth Amendment between a willful deprivation of right and a negligent deprivation of right. So too

did Congress intend that the civil litigant be vindicated.

The answer to the comprised question establishes the pale of the judicial role in the context of the doctrine of judicial immunity.

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by (the) Constitution, the subject is necessarily one for judicial inquiry* * *." Scheuer v. Rhodes, supra.

The imperative of judicial integrity would seem to suggest that the comprised question be considered, that a definitive answer be given and that the state civil litigant be allowed to exercise those remedies that Congress has provided for him, without the impediment of a multitude of impalpable springes set by varied lower court decisions. The criminal litigant need not concern himself with the judicially fashioned doctrine of judicial immunity, or willful deprivation of right, nor should the civil litigant be required to prove a willful, and therefore criminal, deprivation or be impeded otherwise before realizing his constitutional guarantees.

In Lee v. Florida, supra, the court said at 392 U.S. 385:

> "* * *the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity'."

In 1960 the court said:

> "'In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'" Elkins v. United States, 364 U.S. 206, 222 (1960).

The Government, both as prosecutor and as judge, as well as others, negligently, and sometimes willfully, deprives citizens of federal rights.

As stated in Elkins, supra, and quoted in Lee v. Florida, supra, Justice Holmes stated:

> "For those who agree with me no distinction can be taken between the Government as prosecutor and the Government as judge."

The litigant prosecuted is actually vindicated by the court, and the litigant judged in a civil matter is merely guaranteed vindication by the Constitution. The answer to the comprised question is deemed to be the threshold to allow, or clearly preclude, the realization of the civil litigant's constitutional guarantees.

If this Court finds that a civil litigant negligently deprived of a federal

right has no federal remedy, then the Court should so pronounce, in order that Congress may be alerted to its failure to make necessary and proper laws to carry into execution the provisions of the Constitution. On the other hand, if the Court finds that a civil litigant negligently deprived of a federal right does have a federal remedy, then the Court should so pronounce, in order that the judiciary may be directed.

The question touches every citizen, a state civil litigant or potentially so, and each judge, court and officer of the court. The pale of both the judicial role and doctrine of official immunity will be established by an answer, and government will be alerted to govern.

For these reasons it is respectfully prayed that a writ of Certiorari issue to review the order of the Arizona Court of Appeals.

Respectfully submitted this 7th day of October, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 1975, three copies of the Petition for Writ of Certiorari were hand-delivered or mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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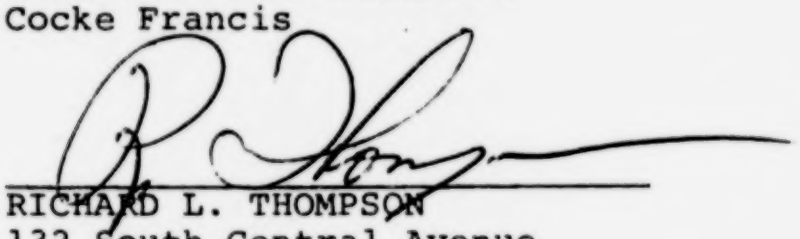

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